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Blending Fields: Tort Law, Philosophy, and Legal Theory

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BLENDING FIELDS: TORT LAW, PHILOSOPHY, AND LEGAL THEORY

PHILOSOPHICAL FOUNDATIONS OF TORT LAW. Edited by David G. Owen.
New York: Oxford University Press, 1995. Pp. xvi, 497. \$75.00.

*Reviewed by Heidi Li Feldman**

I. INTRODUCTION

Anthologies are a tricky business. It takes editorial skill to strike the right balance between variation in topic and continuity of theme. David Owen, the editor of *Philosophical Foundations of Tort Law*, has executed this feat with panache. The volume collects original papers from an impressive array of torts scholars, ranging from Richard Posner and Jules Coleman to Jeremy Waldron and John Finnis to Tony Honoré and Izhak Englard. (It is a tribute to the volume that my illustrative list could have been equally as long and included equally important writers whose papers appear in *Philosophical Foundations of Tort Law*.) The articles by torts scholars offer philosophical insight into tort theory, tort goals, and tort doctrine. As a special bonus, *Philosophical Foundations of Tort Law* concludes with an afterword by Bernard Williams, a major philosopher and a leading ethicist with strong interests in law, politics, and political theory.

Reviewing anthologies is also a tricky business and a laundry list of reactions to each individual essay would be unfair to the authors and tedious to readers of this review. Instead, I propose to concentrate on Williams's contribution to the book. Although Williams's fine entry might require a bit of introduction to those readers who approach *Philosophical Foundations of Tort Law* from the legal side, his piece raises a number of issues particularly pressing to those interested in the relationships between law, philosophy, and legal scholarship.

II. THE PUZZLE OF INTERDISCIPLINARY STUDY

How should we connect related but discrete fields fruitfully without

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collapsing them into one another, thereby sacrificing each discipline's distinctive strengths? This is the classic puzzle for interdisciplinary scholarship: How to be genuinely interdisciplinary?

According to David Owen, *Philosophical Foundations of Tort Law* "cannot make claim to interdisciplinary status in any full sense, for each essay but one is written by a lawyer" and "each is written from a tort law point of view, from the perspective of what philosophy can do for law, of how the law can benefit from borrowing the type of reflective thought that 'belongs' to philosophy" (p.25). Regardless of the editor's disclaimers, each of the essays in *Philosophical Foundations of Tort Law* must face the classic interdisciplinary puzzle, at least in their execution, if not explicitly. Bernard Williams's contribution addresses this conundrum directly.

In *What Has Philosophy to Learn from Tort Law?*, Williams inverts a traditional jurisprudential inquiry. Rather than considering what law can learn from philosophy, Williams investigates how law and legal practices might aid modern philosophy's quest to understand and refine concepts central to our ordinary ethical and political practices. Williams's central thesis, which he calls "the Picture" (p.488) is as follows: Legal "concepts or distinctions that have been variously applied, modified, and reinterpreted within a legal tradition over a period of time" are telling as a "sound and reliable way of thinking about the relevant areas of experience" because the "legal context is one in which a lot turns on the outcome, and hence on the arguments that lead to or legitimate legal outcomes" (p.488). In other words, common-law reasoning adjudicates disputes via concepts and distinctions (e.g., liability, causation) rooted in ordinary experience (e.g., fault, responsibility) but embedded in a body of legal precedent (e.g., the common law of torts) that continuously and self-consciously refines and reworks these concepts and distinctions in order to better resolve current disputes. The pressure exerted by this process on the development of these concepts and distinctions reveals information about them that is relevant to their non-legal counterparts, but which would not emerge during the course of ordinary usage because ordinary usage neither demands nor involves the same sort of intense attention required by common-law development.

I find Williams's hypothesis plausible and intriguing. He defends it against two objections that center on whether legal concepts and distinctions relate to nonlegal ones in the way that Williams's "Picture" requires (p.488). A large part of the modern philosophical enterprise investigates the nature of ordinary concepts—discovering anomalies and, sometimes, fashioning remedies. If an understanding of the law is to bear on this enterprise, there must be a meaningful, well-understood relationship between distinctively legal concepts and the nonlegal concepts philosophy examines. As Williams notes, this relationship can be questioned from two directions.

The first objection concedes that legal concepts and distinctions are "recognizable to common sense" but denies that the legal process puts them

under genuine pressure (p.489). On this view, the concepts and distinctions that drive legal argument are neither commonsensical nor distinctively legal; instead, they derive from other domains. For example, whether or not lawyers and judges realize it, economic concepts and principles govern common-law development. Therefore, philosophers cannot examine the legal concepts in which lawyers and judges cast their arguments in order to learn about related ordinary concepts, because the legal concepts do no real work and therefore come under no real pressure. Williams effectively counters this objection. He observes that legal concepts "must have some force even to serve as rationalizations" (p.489), perhaps even as much force as Williams's original thesis posits.

The arguments that do the work at the manifest level must be the familiar ones. The theory [i.e. law and economics] regards them as rationalizations, but they must nevertheless do some work, since some process is actually going on at the manifest level, and that process must have some of the characteristics (of claims being argued against counter-claims and so on) that were identified [in Williams's original thesis] (p.489).

Philosophers will recognize the pedigree of this sort of rejoinder. Williams responds, in the spirit of J.L. Mackie, that whatever "really" drives the development of legal concepts, legal practitioners use these concepts to conduct their business, and they could not do this if the legal concepts had no force in their own right.¹ Williams proceeds to note that even if theories such as law and economics correctly identify a "porosity" (p.490) that makes legal concepts responsive to the latent theory, this simply provides further information about the nonlegal concepts related to the legal ones, raising the question of—and perhaps the beginning of an answer to—whether the non-legal concepts are similarly porous.

The second objection concedes that common-law adjudication exerts genuine pressure on legal concepts and distinctions, but denies that common-law concepts and distinctions relate to nonlegal ones. Williams finds this line of objection simply implausible on its surface (p.490). I agree. For example, tort concepts of liability and causation are clearly kin to their everyday counterparts.² While there are subtle and important questions concerning the

1. The ethicist J.L. Mackie argued that ethical values are not actual properties of the world. J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 15 (1977). According to Mackie it is wrong to speak as if ethical values are indeed such properties. *Id.* at 35. But Mackie did not think this ontological claim should cause us to change our moral discourse or suspend our ethical judgment. In denying a certain ontological status to moral values, Mackie did not deny that ethics and morality do and should inform human action. Indeed, Mackie urged that we continue to develop ethical standards and use moral judgment to guide our behavior. *Id.* at 106, 123-124.

2. See Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1210-11

degree and kind of autonomy legal concepts possess, many legal concepts are certainly not far removed or insulated technical ones. Indeed, it is hard to see how tort concepts in particular could be so insulated without becoming inaccessible to the lay jurors who must apply them to decide specific tort actions.

I also agree with Williams when he pinpoints a difference in the *use* of everyday concepts and their legal counterparts. Williams correctly notes that the law demands closure and a final resolution of a case. Finality can require a conclusion about the nature of a legal concept where the contours of the ordinary counterpart can be left fuzzy because ordinary usage of a concept does not emulate the call for the finality in legal adjudication (p.490). This need for closure can also distort legal use of concepts with counterparts in domains other than the ordinary, such as science. For example, tort law's treatment of causation—a concept with both an ordinary meaning and a scientific one—forces certain issues which could and would be left open by science.³ However, so long as we understand why the law operates as it does, legal applications of concepts with ordinary or scientific counterparts will be instructive, even when the legal application seems forced from the perspective of ordinary or scientific use. The caveat of understanding law on its own terms is crucial, as Williams realizes when he writes:

If philosophy can be instructed by the law in the terms offered by [Williams's thesis] . . . it will need an understanding of what the forces are that operate on the law and are expressed in it Philosophy, then, will not only have to attend to the principles and goals of tort law; it will also have to understand at a theoretical level why it has those principles and goals (p.492).

Williams is right. He does, though, overlook the distinctive place of legal scholarship and law itself in achieving the appropriate theoretical understanding of law's principles and goals. Williams does not affirmatively deny potential theoretical contributions from law and legal scholarship. Indeed, he does not even mention legal scholarship—a telling omission. Williams writes as if it is politics and philosophy, particularly political philosophy, that will supply a substantial measure of theoretical understanding of tort law's animating ideals and purposes:

(1994) (noting the ties between the legal concept of negligence and the popular, moral concept of negligence).

3. See Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 74 Tex. L. Rev. 1, 41-43 (1995) (arguing that the legal system's demand for prompt and just dispute resolution gives rise to a different approach to understanding causation than the scientific one).

[I]t is an aspiration of a liberal society that the operations of power should be so far as possible transparent, in at least the modest sense that their supposed legitimation should not rest on systematic misunderstanding.

This modest requirement does not imply that every political practice must be legitimated in terms of some theory But in a state governed by law the operations of the law represent the most direct application of power to the individual, and granted further the highly contested justifications of these operations in modern liberal societies, it is *in fact* the case that in such societies the demands of transparency are unlikely to be met without the resources of a theoretical account. Some of that account, though political, will undoubtedly overlap with the philosophical contribution and constitute part of a political philosophy.

. . . .
 . . . [O]n the account I am suggesting, philosophy tries to learn from the operations of the law, in conjunction with a theory of what the law is up to—a theory partly provided by philosophy itself (pp.492-93).

As always, Williams is subtle. He is careful to avoid falling back onto a top-down approach, according to which we should ask what philosophy can teach law. Nevertheless, Williams does privilege philosophy's position in the theoretical domain.

While there is a history of fractious controversy over law's autonomy and the distinctiveness of legal scholarship,⁴ most lawyers do not regard themselves as politicians and most legal scholars do not regard themselves as political philosophers. I think—and I believe Williams would concur—that these self-images are correct. To borrow from Williams's discussions about manifest legal argument and what might lie under its surface, one must acknowledge the self-images and account for them even if one thinks lawyers and legal scholars are self-deceived about their respective enterprises. It is beyond the scope of this review for me to air the debate about the relationship between law and politics or between legal scholarship and political philosophy. I do think lawyers' and legal scholars' self-understandings create a presumption of meaningful distinctions among their enterprises, politics, and philosophy.

Even if we grant that law and legal scholarship maintain some notable degree of autonomy from politics and political philosophy, the question still remains: how might law and legal scholarship contribute uniquely to a

4. See Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988) (assessing the relationship between philosophy and standard legal scholarship).

philosophically useful understanding of law's principles and goals? In other words, how do law and legal study provide theoretical knowledge that helps us understand the information provided by the common law about concepts under pressure? To answer these questions, I examine a central case in tort law to illustrate how legal scholarship can contribute to philosophical understanding of central concepts in tort law.

III. *PALSGRAF V. LONG ISLAND RAILROAD*⁵

Every first-year American law student studies *Palsgraf*. Legal scholars have written about it extensively.⁶ And, the case centers on two major concepts in tort law—duty of care and proximate cause—both of which fit Williams's picture of legal concepts with nonlegal counterparts. By looking closely at *Palsgraf*, we can test Williams's hypothesis about whether and how common law can edify philosophical understanding of nonlegal concepts with legal counterparts.

A brief review of *Palsgraf*'s central legal concepts helps to understand the remarkable features of the appellate opinions in the case. Traditionally, the general duty of care constitutes the liability standard in a tort's negligence regime.⁷ This duty imposes an obligation on each of us to act as would a reasonable person of prudence with due regard for his neighbors' safety.⁸ We owe this duty generally, to society at large.⁹ If we breach this duty, then we are at fault and may owe damages to those injured because of our breach. However, this may not be true in every instance. Even if we have breached the general duty of care, thereby causing injury to another, our victim may not be able to recover damages from us. To recover the victim must establish not only that our careless conduct in fact caused him injury (an empirical question), but he must also prove that our conduct proximately caused his harm.¹⁰ To demonstrate proximate causation, a plaintiff must show a sufficiently tight connection between the defendant's negligent behavior and

5. 162 N.E. 99 (N.Y. 1928).

6. See Richard A. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 GEO. L.J. 1377 (1985); Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); Leon Green, *The Palsgraf Case*, 30 COLUM. L. REV. 789 (1930); William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

7. RESTATEMENT (SECOND) OF TORTS § 4 (1965).

8. See *id.* § 283; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 174 (5th ed. 1984).

9. RESTATEMENT (SECOND) OF TORTS § 4 cmt. b (1965); KEETON ET AL., *supra* note 8, § 30.

10. RESTATEMENT (SECOND) OF TORTS § 430 (1965).

the plaintiff's resulting injury.¹¹ At the doctrinal level, courts have long wrestled with defining what counts as a sufficiently tight connection. At the trial level, the issue of proximate causation tends to be less problematic, because in the majority of tort cases the causal connection between the defendant's carelessness and the plaintiff's injury is rather obvious. For example, if I run you down while I am rollerblading, thereby causing you to break your wrist, there is little question that my behavior is closely and causally connected with your injury, regardless of the doctrinal measure of proximate causation.

In other cases, however, an attenuated set of events may result in a plaintiff's injury. In these cases, where intuition founders, the fact finder needs to rely more heavily on doctrinal structure to determine proximate causation. Historically, two approaches have tempted courts.¹² The first approach requires the fact finder to decide whether the connection between the defendant's careless conduct and the plaintiff's injury is direct. If it is, then the plaintiff recovers.

The second approach asks the fact finder to determine whether the injury suffered by the plaintiff was a foreseeable result of the defendant's carelessness. The difference between these approaches often vanishes in the face of specific factual situations because of the high correlation between directness and foreseeability. However, in some cases the two tests yield different results,¹³ and officially the majority of American courts adopt the directness approach.¹⁴

Regardless of the doctrinal approach to proximate causation, tort law assigns the fact finder the job of assessing this issue. In other words, it is usually the jury that decides whether the causal connection between the defendant's careless act and the plaintiff's injury was sufficiently proximate to warrant awarding damages to the plaintiff. Likewise, tort law reserves for the jury the issue of breach of the general duty of care. Thus, the jury decides the question of whether the defendant's conduct was in fact unreasonably careless.

11. *Id.* § 431 cmt. a.

12. See KEETON ET. AL., *supra* note 8, § 42 (describing and comparing the "directness" and "foreseeability" approaches to proximate causation).

13. The most famous example is *In re Polemis & Furness, Withy & Co.*, 3 K.B. 560 (1921), an English case that lays down the directness approach. In that case, the defendant's employees carelessly caused a plank to fall into the ship's hold causing a spark that ignited a fire that consumed the ship. The court ruled that while fire might not have been the foreseeable result of carelessness in handling the plank, the fire was the direct, and therefore proximate, result of the plank striking the ship.

14. See *In re Kinsman Transit Co.*, 338 F.2d 708, 723-25 (2d Cir. 1964). Judge Friendly wrote for the court: "The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct,' and the damage, although other and greater than expectable, is of the same general sort that was risked." *Id.* at 724.

In contrast, torts treats the task of defining the standard of care itself as a matter of law, and therefore as a question for the judge.

Palsgraf is fascinating because it problematizes the preceding account of the relationship between careless conduct and proximate causation and the respective roles of the judge and the jury. In a famous opinion for the highest court of New York, Chief Justice Cardozo sought to recast the way courts approach the duty of care, thereby shifting power from the jury to the judge.

Writing for a four to three majority, Chief Justice Cardozo characterized the underlying facts of *Palsgraf* as follows:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.¹⁵

Cardozo's account masterfully sets up his fundamental claim: The connection between the railroad guards' act and *Palsgraf*'s injury is too attenuated to support liability for the railroad. At the outset Cardozo mentions the plaintiff but not until many words, clauses, and sentences later does he refer to her again. Cardozo does not mention that it was summertime and therefore likely that passengers on the platform were traveling out of Manhattan to the beach for recreation, including playing with fireworks. Both by his prose and by his selection of facts, Cardozo makes the guards' carelessness seem quite remote from what befell *Palsgraf*.

Such a factual account would lead the trained tort lawyer to expect an appellate opinion ruling on the issue of proximate cause, eventually concluding that the plaintiff could not carry her burden of proof on this issue. But the originality of Cardozo's famous decision lies in the unexpected grounds on which he relies to overturn the original jury verdict in favor of *Palsgraf*.

15. *Palsgraf*, 162 N.E. at 99.

Instead of arguing that the jury decided incorrectly that the guard proximately caused Palsgraf's injuries, Cardozo argued, "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. *Relatively to her* it was not negligence at all."¹⁶

This is an odd way to discuss negligence. As I noted earlier, traditional tort doctrine understands negligence as a breach of a general duty of care, one owed to society at large. As Bernard Williams might describe it, the traditional tort concept, like its ordinary counterpart, is not victim-specific. One can be generally careless, and—with luck—inflict no injury at all. Even so, one would still have been careless.

Justice Andrew's dissent in *Palsgraf* pinpointed these issues:

[M]ay [the plaintiff] recover the damages she has suffered . . . ? The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept—the breach of some duty owing to a particular person or to particular persons? Or, where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? . . . If . . . we adopt the second hypothesis, we have to inquire only as to the relation between cause and effect. We deal in terms of proximate cause, not of negligence.¹⁷

Andrews then emphasized the traditional approach to breach and proximate causation:

Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. . . . The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large. Such is the language of the street.¹⁸

After linking legal and nonlegal understandings of negligence, Andrews turns to proximate causation. Yet he does not exhaustively delimit this concept.

These two words [proximate cause] have never been given an inclusive definition. What is cause in a legal sense, still more what

16. *Id.* (emphasis added).

17. *Id.* at 102.

18. *Id.*

is a proximate cause, depend in each case upon many considerations, as does the existence of negligence itself. Any philosophical doctrine of causation does not help us. . . .

. . . . What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.¹⁹

Although Andrews rejected even the attempt to define proximate cause comprehensively, he did suggest how a trial court should approach the issue.

The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space.²⁰

Then, applying this method, Andrews concluded that a fact finder could reasonably decide that the defendant had proximately caused Palsgraf's injuries.

This last suggestion is the factor which must determine the case before us. The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent. For its proximate consequences the defendant is liable. . . . Mrs. Palsgraf was standing some distance away. How far cannot be told from the record—apparently 25 or 30 feet, perhaps less. Except for the explosion, she would not have been injured. We are told by the appellant [the railroad guard] in his brief, "It cannot be denied that the explosion was the direct cause of the plaintiff's injuries." So it was a substantial factor in producing the result—there was here a natural and continuous sequence—direct connection. The only intervening cause was that, instead of blowing her to the ground, the concussion smashed the weighing machine which in turn fell upon her. There was no remoteness in time, little in space. And surely, given such an explosion as here, it needed no great foresight

19. *Id.* at 103.

20. *Id.* at 104.

to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. . . .

Under these circumstances I cannot say as a matter of law that the plaintiff's injuries were not the proximate result of the negligence.²¹

In many respects, *Palsgraf* and its subsequent history confirm Williams's hypothesis about how common law can illuminate concepts with legal and nonlegal versions. But *Palsgraf* also demonstrates that Williams overlooks some of what philosophers must understand in order to plumb common law for insight.

In *Palsgraf* a narrowly divided appellate court splits, with the minority adopting the traditional common law approach to duty of care and proximate cause and the majority embracing a novel path. This is an unusual result. It requires explanation, particularly if philosophers are to learn from the case. Why did the majority not side with the "language of the street" and the precedent of tort doctrine, granting the defendant's breach of its duty of care and deciding the case on the issue of proximate causation? Cardozo's opinion skirts the edges of common law propriety and strains the relationship between legal and nonlegal understandings of carelessness. Understanding why Cardozo would take these steps calls for a deeper appreciation of both legal practice and tort theory. But whereas Williams emphasizes the need to look to politics and political philosophy to gain such an appreciation, I maintain we need to look as much to legal theory and the law itself. This calls for distinctively legal scholarship, performed by those trained in and familiar with particular substantive legal fields and the procedural mechanisms of the common law.

A nonlawyer reading *Palsgraf* might appreciate that Cardozo advances a substantive change in the concept of the duty of care, particularly because Andrews draws attention to this. What the nonlawyer probably will not appreciate is the procedural impact of this change. Recall that Cardozo sought to replace the concept of general carelessness with a victim-specific concept of carelessness. This shift would have expanded the power of the trial judge at the expense of the purview of the jury. Using Cardozo's approach, the judge would determine whether the defendant's putative carelessness was sufficiently directed toward the plaintiff for the plaintiff to bring a cause of action. Only if the judge decided this question in the plaintiff's favor could she reach a jury on the issue of negligence itself. Following his own approach, Cardozo overturned the original jury verdict in *Palsgraf* on the ground that the guards' carelessness was not directed toward Palsgraf. Under Cardozo's rule, many cases that would otherwise come before a jury would be dismissed by

21. *Palsgraf*, 162 N.E. at 105.

the judge.

Cardozo was certainly aware of this. He was also aware of the liability limiting effects of such a shift in power from jury to judge. The victim-specific concept of negligence circumscribes the scope of injured people with standing to bring suit. Furthermore, by introducing another preliminary issue for the judge, Cardozo's reconceptualization would deter lawsuits. Because tort plaintiffs are usually judged more harshly by judges than by juries, the court's holding would discourage personal injury lawyers—who work on a contingency fee basis—from taking cases on behalf of injured plaintiffs who were not fairly obviously within the direction of the defendant's negligence. Even if lawyers took such cases, they would be more likely to settle them for lower amounts than if they thought these plaintiffs would be able to reach a jury.

Even if we favor limiting tort liability, this goal might not best be accomplished via Cardozo's transformation of the concept of the general duty of care. Moving from the procedural level to the theoretical one, we must investigate the impact of a victim-specific duty of care on tort law's traditional goals: compensation for those injured by unduly risky conduct; deterrence of such conduct; and corrective justice, whereby the tortfeasor makes whole the injured plaintiff. By limiting liability, Cardozo's approach would affect all three. Clearly, limiting the standing of those injured through others' carelessness decreases instances of compensation and corrective justice. And while part of the effect on deterrence is obvious, part of the potential effect is more subtle. Plainly, any liability limiting measure makes activity that puts others at risk less costly. Moreover, a victim-specific duty of care would have a quite complex impact on deterrence.

Carelessness has a distinctive feature. When people act carelessly, they act unthinkingly. Often then, precisely what a tort defendant has failed to do was to think about who might be injured by the defendant's own actions and in what way. Likewise, a victim is unlikely to have been able to warn the injurer that the defendant's conduct would injure the victim. Generally, an accident brought about by carelessness is even more unexpected from the victim's point of view than from the injurer's. How then to discourage people from unthinkingly acting in ways that are likely to injure others?

The traditional duty of care answers this riddle. This duty obligates each of us to act *generally* with care. To fulfill the duty one need not—indeed should not—attempt to identify particular persons whom one should treat with special care. Instead, one ought to exercise broad caution. This may lead one to contemplate particular persons who might be affected by one's activity, but it may not. For example, careful driving involves maintaining appropriate speed, signaling, checking one's mirrors, and so forth. When a driver takes these measures, the driver is not usually contemplating the particular people put at risk. Yet these measures protect any number of people, including those who might be injured through an unexpected series of events should the driver omit precautions and cause an accident.

Generally, courts have not adopted the victim-specific concept of negligence Cardozo advanced in *Palsgraf* (although in some jurisdictions Cardozo's ideas about foreseeability have influenced courts' interpretations of proximate causation).²² With a more theoretically sophisticated understanding of the relationship between the duty of care and the deterrence objective of tort law, this outcome makes sense. I submit that, compared to nonlawyers (including philosophers and politicians who are not trained in law), lawyers and legal scholars might more readily recognize the significance of the connection between keeping the duty of care general and discouraging unthinking carelessness, just as they would more likely recognize the procedural ramifications of Cardozo's proposed change. Thus, those with legal training and experience can perceive the radical dimension of *Palsgraf*, and therefore understand its relatively limited precedential impact. Yet at the same time, legal thinkers can quickly appreciate that the opposition between Cardozo's radicalism and Andrews's traditionalism makes *Palsgraf* a focal point for study and debate, despite the case's relatively limited effect on subsequent tort law development.

Palsgraf, political philosophy, and legal scholarship have a more general relationship too. We should not expect political philosophy to offer much direct theoretical insight into the case law and central concepts of any particular legal field. Political philosophy has traditionally provided relatively grand theory, at least compared to the sort of particularity found in specific cases focused on applications of distinctive concepts in a given area of law. If we want to bring political philosophy to bear on common law, we must mediate between these two styles. Legal scholarship of all sorts can, and often does, provide the theoretical insight Williams considers necessary for philosophy to learn from law. It is a further open question whether this educational project would benefit more from bringing political philosophy to bear on the knowledge provided by legal scholarship or the philosophical knowledge gained by a theoretically informed examination of the common law.

IV. THICK CONCEPTS AND THE MUTUAL EDUCATION OF LAW AND PHILOSOPHY

Williams writes: "[I]t would be very surprising if philosophy could learn only from the less controversial parts of legal argument and doctrine, and it is itself significant that some concepts constantly cause trouble in the law and provide a focus for reinterpretation and controversy" (p.494). Again, Williams is right. Yet again, he omits an important and intriguing point related to his

22. The judicial reception of *Palsgraf* is reflected in American legal education. For example, Richard Epstein, a leading torts scholar, includes *Palsgraf* in the proximate cause section of his casebook. RICHARD EPSTEIN, CASES AND MATERIALS ON TORTS 491, 512 (6th ed. 1995).

claim: In tort law, and perhaps the common law more generally, it is precisely the same concepts that are at once controversial and noncontroversial. Concepts like negligence, strict liability, cause-in-fact, and proximate cause are the workhorses of tort law, cleanly resolving many disputes over personal injuries. But these same concepts are also the ones at the center of some of the fiercest debates in appellate case law. Interestingly, these central legal concepts are usually "thick concepts," a term coined by Williams himself in his superb book *Ethics and the Limits of Philosophy*,²³ and philosophy does shed light on why thick legal concepts tend to function very smoothly in some instances and quite poorly in others. At the same time, through careful study of case law, philosophy can learn more about the nature and workings of thick concepts.

Williams characterizes thick concepts as "world-guided" and "action-guiding" in virtue of the specific way in which it is world-guided.²⁴ In other words, thick concepts apply only under certain factual circumstances. By virtue of their applicability, these concepts evaluate those circumstances. This evaluative component gives thick concepts force to guide our feelings, beliefs, and actions. A good example of a thick concept is *rude*. While there may be gray areas, this concept describes a limited range of behavior and simultaneously evaluates that behavior negatively. Actually, this depiction of the evaluative force of rude is too rough. Behavior that is correctly deemed rude is not just generically bad: its negative quality is more nuanced. Rudeness is not wicked or unjust, two other possible ways in which behavior, broadly speaking, can be bad. And our responses to rudeness—emotional or behavioral—reflect the nuanced and distinctive way in which rudeness, again speaking broadly, is bad. The subtleties in both the descriptive and the evaluative dimensions of a thick concept make it especially precise in guiding our feelings, beliefs, and behavior: We do not jail rude people (at least not for their rudeness), and we do not feel about them like those whose behavior is more aptly described by different thick concepts—say, the dull or the prissy. A thick concept is an instrument for sensitively navigating between the way the world is, our responses to it, and the judgments we make.

By now we can easily see why thick concepts pepper common law. Common-law reasoning turns on the considered application of thick concepts. For example, courts assess whether certain events constitute a breach of the duty of care or proximate causation and, depending upon the assessment, make

23. BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985). Philosophers have studied thick concepts throughout the second half of the twentieth century. See Feldman, *supra* note 2, at 1191-94. I have written about thick concepts more extensively elsewhere, actually counting them a subset of a broader category of concepts that seem to blend evaluation and description. See *id.* at 1194-1212. For present purposes, however, we can do with a less careful discussion of such concepts, just enough to understand why the law is replete with them.

24. WILLIAMS, *supra* note 23, at 140.

certain judgments about liability. Just as thick social concepts—such as rude, dull, or prissy—thick legal concepts elicit different evaluative responses and therefore different feelings, beliefs, and actions. For example, compare negligence with recklessness or intentional infliction of injury. These thick legal concepts apply to different facts, sound distinct evaluative tones, and lead to different consequences in legal liability.

So far, I have set to the side two important features of thick concepts. First, thick concepts can be consciously engineered, either from the ground up or by renovating a preexisting concept. Reflective users can self-consciously attempt to modify a thick concept's descriptive or evaluative dimension, or both. Sometimes users attempt such modification quite explicitly and openly (consider the history of the concepts "gay" and "queer"). Other times they pursue modification more indirectly, perhaps by simply acting as if other users have already accepted the change and applying the concept accordingly (consider the development of the concept "feminist"). These two strategies can also be combined.

The second notable characteristic of thick concepts is that their applicability is not always easy to decide. Sometimes one or both dimensions of a thick concept will fit the circumstances. Gray cases provide especially good opportunities for users seeking to modify a thick concept, particularly for a user taking a somewhat indirect approach. Capitalizing on other users' discomfort with the suitability of the thick concept under the circumstances, someone seeking to re-engineer the concept can motivate others to accept the revised version. Among highly reflective users of thick concepts, this dynamic can become extremely complex. Such users may disagree about whether a given thick concept, traditionally understood, applies readily. One user may anticipate that another will claim grayness in order to appeal for modification. Such a claim of grayness may be more or less disingenuous.

Common-law cases illustrate the fully panoply of how thick concepts function and develop. Often, thick legal concepts operate smoothly, settling issues and outcomes. In other cases, however, precisely the same concepts become problematic. As *Palsgraf* demonstrates, judges may disagree over the applicability or contours of the most basic thick legal concepts. The opinions in *Palsgraf* indicate that judges appreciate the thickness of certain legal concepts, acknowledging and exploiting this characteristic in their arguments. Because thick concepts steer common-law reasoning, when judges disagree over a given thick legal concept's applicability or shape, the practical stakes can be high with both procedural and substantive consequences.

As a vehicle for exploring thick legal concepts and their use in appellate opinions, *Palsgraf* can be read several ways. On first reading, the case is an easy one. Taking the traditional view of the descriptive and evaluative dimensions of breach and proximate cause, one can argue, as Judge Andrews did, that these concepts apply to the facts of the case in a fairly, if not perfectly straightforward way. Thus, these concepts should have clearly settled

the issue of the railroad's liability for Mrs. Palsgraf's injuries. Although Judge Andrews certainly would not have referred to proximate cause as a thick concept, his discussion bespeaks his appreciation of the concept's dual descriptive and evaluative character and its role in guiding decisions. He raises the problem of the concept's reaches with a series of analogies: ripples in a pond caused by a boy throwing a stone, a stream joined by tributaries until it becomes a river, and a fire spreading from a spark to a haystack to a series of buildings.²⁵ Andrews identifies both descriptive guideposts and evaluative considerations that bear on how proximate cause applies to such situations. Thinking more descriptively,

[t]he court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? . . . [C]ould the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space.²⁶

Of course even these seemingly descriptive criteria have strong evaluative overtones. What we regard as natural, substantial, direct, foreseeable, and remote is not independent of our values. Andrews recognizes that these judgments require reference to the more obviously evaluative dimension of proximate cause, a dimension comprised "of convenience, of public policy, of a rough sense of justice."²⁷ Andrews does not suggest that a jury *could not* have reasonably declined to regard the railroad guards' conduct as a proximate cause dislodging the scales that struck Palsgraf; but he does conclude that a jury *could* reasonably and appropriately apply the concept to that conduct and the resulting injuries to the plaintiff, thereby finding the defendant liable.²⁸

A second reading also makes the case fairly easy, but in a different way than Andrews' interpretation did. On this reading, the concept of proximate cause definitely applies. The only difficulty lies in deciding which way it applies, that is whether this concept definitively rules out or definitively rules in the guards' conduct as the proximate cause of Palsgraf's injuries. One might argue that given the law's accepted understanding of proximate cause, Andrews was rather open-minded to suggest that reasonable fact finders could reach opposite conclusions concerning whether the guards' conduct proximately caused Palsgraf's injuries. Depending upon how one perceives the underlying facts of the case and the implications of holding the railroad liable,

25. *Palsgraf*, 162 N.E. at 103-04.

26. *Id.* at 104.

27. *Id.* at 103.

28. *Id.* at 105.

one could argue either that the guards' conduct definitely was or definitely was not the proximate cause of the plaintiff's harm. Based on either of these arguments, clearly the issue should have been taken from the jury and decided by the trial judge.

On a third reading, *Palsgraf* is truly a hard case because the thick legal concepts of breach and duty of care are not as clear as the traditional view would have it. In my earlier review of breach of the duty of care, I characterized the general duty of care as unproblematically understood as an obligation to society at large to act like a reasonable person of prudence with due regard for a neighbors' safety.²⁹ Accordingly, duty of care is apparently a thick concept. Although Cardozo might agree with this, he would likely challenge my view of the traditional meaning of duty of care by questioning whether I had characterized the concept correctly. Cardozo depicts negligence as relative, characterizing the duty of care as one owed to specific victims, rather than to society as a whole. If there were precedent for Cardozo's depiction, regarding him as a sincere challenger to my traditional view would make sense. *Palsgraf* would then be a difficult case because it would demand resolution of two rival lines of precedent about the concept of the duty of care.

This reading does not best capture Cardozo's treatment of duty of care. A better reading accepts that Cardozo's depiction enjoyed little or no precedential support and understands Cardozo's opinion as an effort to re-engineer the duty of care, maintaining its thickness, but modifying both its descriptive and evaluative dimensions. Cardozo combined both a direct and an indirect strategy in this attempt. Early in his opinion, he writes as if the concept of negligence is generally understood as he wishes to portray it: "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all."³⁰ Cardozo's statement does not suggest an unusual way to talk about negligence. However, after arguing at length that rejecting the victim-specific version of the duty of care would "involve us, and swiftly too, in a maze of contradictions,"³¹ Cardozo later states a conclusion he apparently thinks he has been defending: "Negligence, like risk, is *thus* a term of relation."³² This sounds more like the voice of someone who is explicitly urging a revision of the official understanding of the concept. Cardozo's position rests in part on an unstated claim that negligence is already treated as if it were officially understood this way. Thus, Cardozo skillfully downplays the radical aspect of this revision. Cardozo is adroit. He redesigns the duty of care with a nimble interweaving of direct and indirect

29. See *supra* notes 8-9 and accompanying text.

30. *Palsgraf*, 162 N.E. at 99.

31. *Id.* at 100.

32. *Id.* at 101 (emphasis added).

strokes, illustrating just how effectively a sophisticated, reflective, practiced user of thick legal concepts can attempt their modification.

Cardozo's sensitivity to the thickness of the concept of the duty of care is evidenced by the way he addresses both its evaluative and descriptive dimensions, as well as his keen awareness that the concept's application guides outcomes. At first, his opinion concentrates on the type of wrongness negligence involves, distinguishing its evaluative tone from others.³³ Then, Cardozo turns to the descriptive angle, supplying a series of factual hypotheticals designed to show the absurdity of a non-relative, general duty of care. These hypotheticals range from a guard stumbling over newspapers that turn out to be dynamite³⁴ to someone who "jostles [his] neighbor in a crowd . . . when the unintended contact casts a bomb upon the ground" thereby injuring those "at the outer fringe."³⁵

It seems plausible that Cardozo's keen sense for how thick concepts function helped him garner a one-vote majority opinion that rather radically re-engineers the concept of the duty of care. Philosophy can learn about thick concepts not only from Cardozo's opinion in *Palsgraf*, but also from the subsequent impact of his ideas. As I noted previously, *Palsgraf* did not inaugurate a lasting change in tort law's treatment of the duty of care. While Cardozo's efforts to shape that thick concept did not take, his ideas did influence the doctrinal development of proximate cause, the thick legal concept Andrews considered central to *Palsgraf*. Philosophy can learn from Andrews as well. In his discussion of the guidelines for applying the concept of proximate cause, Andrews lists various factors courts have thought pertinent to assessing proximate cause—directness, remoteness, naturalness, public policy, convenience, and politics. However, Andrews does not clarify the relationships between these considerations. This sort of murkiness makes a thick concept ripe for renovation. Restricting liability according to the foreseeability of the class of potential victims that includes the plaintiff—essentially, Cardozo's idea—establishes clearer guidelines for assessing proximate causation.

V. PHILOSOPHICAL FOUNDATIONS OF TORT LAW AND THE INTERDISCIPLINARY PUZZLE

David Owen's *Philosophical Foundations of Tort Law* is an important collection of essays that seeks to explore and understand the relationship between tort law concepts and philosophy. Owen fulfills his objective of "bring[ing] together the learning of these two separate disciplines" by inviting

33. *Id.* at 99.

34. *Id.* at 100.

35. *Id.* at 101.

an important group of writers to share their thoughts on what philosophy can learn from tort law (p.25). In addition, Owen includes Bernard Williams’s Afterword, which goes further by juxtaposing this inquiry. Williams reminds the law of torts that it too can benefit from a much needed reevaluation of those philosophic concepts which guide the field.

By examining individual common-law cases, as I did with *Palsgraf*, and by comparing how thick legal concepts function in different cases, philosophers can engage in the sort of learning from the ground up that Bernard Williams proposes in *What Has Philosophy to Learn from Tort Law?* If the thick legal concepts under study have nonlegal counterparts, this exercise could provide precisely the sort of knowledge Williams envisions. Even if thick legal concepts turn out to be rather technical, with no obvious nonlegal counterparts, philosophy could benefit from a detailed analysis of how judges and lawyers apply, deploy, manipulate, exploit, and engineer thick legal concepts. Such an analysis could yield general insights into the workings of thick concepts throughout the various domains in which they operate.

In addition to Williams’s contribution, many of the essays in *Philosophical Foundations of Tort Law* contribute to serious interdisciplinary study. I particularly enjoyed *Tort Law in the Aristotelian Tradition* by James Gordley and *Risk, Harm, and Responsibility* by Stephen Perry. I note these articles in concluding this review because they both exemplify the sort of legal scholarship that fills the vacuum overlooked by Williams in his account of the relationship between philosophy and law—the sort of legal scholarship I pursued on a smaller scale in the preceding sections of this review. Both Gordley and Perry identify and address an issue with philosophical and legal significance, drawing on legal and philosophical knowledge to explore some of tort’s broader principles and goals. This scholarship is distinctively legal, yet at the same time deliberately and effectively engages philosophy. Fortunately for those who value such genuinely interdisciplinary work, so do many of the other pieces in *Philosophical Foundations of Tort Law*.

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